SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 686

GEORGE C. REITZ,

Appellant,

vs.

CARROLL E. MEALEY, AS COMMISSIONER OF MOTOR VEHICLES OF THE STATE OF NEW YORK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION.

HARRY A. ALLAN,
DANIEL H. PRIOR,
Counsel for Appellant.

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Appellee.

STATEMENT AS TO JURISDICTION.

The appellant in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

A.

Statutory Provisions Sustaining Jurisdiction.

The statutory provisions relied upon by the appellant to sustain the jurisdiction of the Supreme Court of the United States to review the judgment of the Statutory District Court of Three Judges, entered in the office of the Clerk of the United States District Court for the Northern District of New York, are Secs. 238 and 266 of the Judicial Code,

as amended (U. S. Code, Title 28, Secs. 345 and 380), permitting a direct appeal from the Federal Statutory District Court of Three Judges to the Supreme Court of the United States from the decision, order or judgment of said court granting or denying an injunction based upon the alleged unconstitutionality of a State statute.

B.

State Statute Involved.

New York State Vehicle & Traffic Law, Sec. 94b. (New York Laws of 1929, Chap. 695, as last amended by Laws of 1939, Chap. 618).

> "*Sec. 94-b. Failure to satisfy judgments; revocation of licenses and security.*
>
> The operator's or chauffeur's license and all of the registration certificates of any person, in the event of his failure within fifteen days thereafter to satisfy every judgment in excess of one hundred dollars which shall have become final by expiration without appeal, of the time within which appeal might have been perfected or by final affirmance on appeal, rendered against him by a court of competent jurisdiction in this state, or in any other state or the District of Columbia, or of any district court of the United States, or by a court of competent jurisdiction in any province of the Dominion of Canada, for damages on account of personal injury, including death, or damages to property, resulting from the ownership, maintenance, use or operation of a motor vehicle by him, his agent, or any other person for whose negligence he shall be liable and responsible, shall be forthwith suspended by the commissioner of motor vehicles, upon receiving a certified copy of such final judgment or judgments from the court in which the same are rendered, showing such judgment or judgments to have been still unsatisfied after the expiration of fifteen days after the same became final as aforesaid, and, except as otherwise pro-

vided in this chapter, shall remain so suspended and shall not be renewed nor shall any other motor vehicle be thereafter registered in his name while any such judgment or judgments remain unstayed, unsatisfied or discharged, except by a discharge in bankruptcy, to the extent of at least five thousand dollars for an injury to one person in one accident, and to the extent of ten thousand dollars for an injury to more than one person in one accident, and to the extent of one thousand dollars for an injury to property in any one accident or three years shall have elapsed since such suspension, and until the said person gives proof of his ability to respond in damages, as required in section ninety-four-o of this chapter for future accidents. Provided, however, if the judgment creditor consents in writing that the judgment debtor be allowed license and registration, the same may be allowed for six months from the date of such consent by the commissioner and thereafter until such consent is revoked in writing, if proof of ability to respond in damages is furnished in accordance with the provisions of this chapter. It shall be the duty of the clerk of the court, or of the court, where it has no clerk, in which any such judgment is rendered, to forward immediately, upon written demand of the judgment creditor or his attorney, after the expiration of said fifteen days as aforesaid, to such commissioner a certified copy of such judgment or a transcript thereof. In the event the defendant is a non-resident it shall be the duty of the commissioner to transmit to the commissioner of motor vehicles or other officer or officers having in charge the licensing of chauffeurs and operators and the registration of motor vehicles of the state or of any province of Canada of which the defendant is a resident, a certified copy or copies of the said judgment. If after such proof has been given, any other such judgment shall be recovered against such person for any accident occurring before such proof was furnished, such license and certificates shall again be and remain suspended and no other such license or certificate shall be issued

to such person while any such judgment remains unsatisfied and subsisting, provided, however, that

(1) when five thousand dollars has been credited upon any judgment or judgments rendered in excess of that amount for personal injury to or the death of one person as the result of any one accident, or

(2) when subject to the limit of five thousand dollars for each person, the sum of ten thousand dollars has been credited upon any judgment or judgments rendered in excess of that amount for personal injury to or the death of more than one person as the result of any one accident, or

(3) when one thousand dollars has been credited upon any judgment or judgments rendered in excess of that amount for damage to property as the result of any one accident, resulting from the ownership, maintenance, use or operation of a motor vehicle by such judgment debtor, his agent or by any other person for whose negligence the owner shall be liable and responsible, then and in such event, such payment or payments shall be deemed a satisfaction of such judgment or judgments for the purpose of this section only.

If any such motor vehicle owner or operator shall not be a resident of this state, the privilege of operating any motor vehicle in this state and the privilege of operation within the state of any motor vehicle owned by him shall be withdrawn, while any final judgment against him as aforesaid, shall be unstayed, unsatisfied and subsisting for more than fifteen days, as aforesaid and shall not be renewed, nor shall any operator's or chauffeur's license be issued to him nor any motor vehicle registered in his name until either every such judgment shall be stayed, satisfied or discharged as herein provided or three years shall have elapsed since such withdrawal, and until such person shall have given proof of his ability to respond in damages for future accidents, as required in the next section. This section shall not apply to any judgment where the cause of action arose prior to September first, nineteen hundred and twenty-nine.

No license or registration certificate shall be suspended pursuant to this section if, at the time the cause of action resulting in the judgment arose, the vehicle whose maintenance, use or operation caused the damage was covered by a surety bond or an insurance policy issued pursuant to section seventeen of this chapter or by an insurance policy, issued by a company authorized to do business in this state, insuring the owner and operator thereof against loss from the liability imposed by law for injury to persons or property to the amount of five thousand dollars on account of bodily injury to or death of any one person, to the amount of ten thousand dollars on account of bodily injury to or death of more than one person caused by any one accident and to the amount of one thousand dollars for damage to property and no license shall be suspended pursuant to this section if the holder thereof, at the time the cause of action resulting in the judgment arose, was insured under a motor vehicle liability policy as defined in this article, and these provisions shall be both prospective and retrospective."

C.

Date of Judgment and Date of Application for Appeal.

The final judgment of the Federal Statutory District Court of Three Judges was entered in the office of the Clerk of the United States District Court for the Northern District of New York at Utica, New York, on October 26, 1940, and notice of entry thereof was served upon the appellant herein on November 2, 1940.

D.

Nature of the Case and the Rulings Below.

This action was commenced by an order to show cause directed to and served upon the appellee herein, requiring the said appellee to show cause why all proceedings on the part of the appellee to suspend the chauffeur's license to operate an automobile of the appellant pursuant to Sec.

94b. of the Vehicle & Traffic Law of the State of New York should not be restrained on the ground that in so far as the appellant, a bankrupt, was concerned, the actions of the appellee pursuant to Sec. 94b. of the Vehicle & Traffic Law of the State of New York were unconstitutional and void. By stipulation with the Attorney General of the State of New York an action for an injunction was commenced by the bankrupt. Answer thereto was duly made by the Attorney General, acting on behalf of the appellee and all interested parties defendant.

After a hearing before the Statutory District Court of Three Judges, the bill of complaint of the plaintiff was dismissed, the Court holding by a two to one decision, Cooper J. dissenting, that Sec. 94b. of the Vehicle & Traffic Law of the State of New York was constitutional.

It was claimed in said action and is still claimed by the appellant that Sec. 94b. of the Vehicle & Traffic Law of the State of New York is unconstitutional in so far as its provisions affect the rights of the appellant, a bankrupt; that said section is in violation of the Constitution of the United States, Art. 1, Sec. 8, Clause 4, and invades the field of bankruptcy, which, by the United States Constitution is a power exclusively delegated to Congress. It was and still is further claimed that the said section denies to the appellant equal protection both of the laws of the State of New York and of the United States and violates the Fourteenth Amendment to the Constitution of the United States by depriving the appellant of his property without due process of law.

The cases relied upon by appellant to sustain the jurisdiction of the Supreme Court of the United States are:

Eichkolz v. *Pub. Serv. Comm.*, 306 U. S. 268;
In *Re Buder*, 271 U. S. 461;
Louisville etc. R. Co. v. Garrett, 231 U. S. 298;
Towne v. *Eisner*, 245 U. S. 418.

It is respectfully submitted for the above reasons that the Supreme Court of the United States has jurisdiction of this appeal, pursuant to Secs. 238 and 266 of the United States Judicial Code (U. S. Code, Title 28, Secs. 345 and 380).

Respectfully submitted,

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DANIEL H. PRIOR.

EXHIBIT "A".

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

GEORGE C. REITZ, *Plaintiff*,

against

CARROLL E. MEALEY, Commissioner, *Defendant*.

Before:

L. Hand, Circuit Judge, Cooper and Coxe, District Judges.

On motion for an injunction, restraining the Commissioner of Motor Vehicles of the State of New York from suspending the "chauffeur's" license of the bankrupt.

Harry A. Allan for the plaintiff.

Jack Goodman for the defendant.

L. HAND, C. J.: This is a motion made in an action brought to enjoin the Commissioner of Public Vehicles of New York from suspending the plaintiff's driver's license as a chauffeur. The plaintiff is a bankrupt, duly adjudicated on June 21, 1940, but his discharge has not been granted, nor does it appear that the referee has fixed any time under Sec. 12 of the Bankruptcy Act within which creditors must file their specifications of objection. The defendant has filed an answer, admitting all the essential facts upon which the suspension of a driver's license depends under Sec. 94 (a) of the Vehicle & Traffic Law of New York. These are that judgment shall be recovered against the licensee for damages for injuries to person or property, resulting from the operation of a motorcar, that he shall not pay the judgment within fifteen days, that the judgment creditor shall in writing ask the clerk of the court where the judgment is entered to forward a certified copy of it to the commissioner of public vehicles, and that the clerk shall do so. The section then directs the commissioner to suspend the driver's license for three years unless he

pays the judgment meanwhile, and even if he does, not to restore it within that time, or thereafter, unless he gives the security, required by Sec. 94 (c) of the act, to protect any whom he may injure in the future. The legislature added a proviso in 1936 that upon consent in writing of the creditor the commissioner might restore the license in any case for six months, and for as much longer thereafter as the creditor's consent remains outstanding; but again only in case the debtor gives the security required by Sec. 94 (c). (Laws 1936, c. 448). The general plan of the section is apparent. Although no compulsory insurance is made a condition upon granting them, all licenses are issued subject to two conditions: first, that after one accident in which the judgment of a court has found the licensee at fault, his license will be permanently cancelled unless he takes out insurance; and second, that in any event it will be suspended for such part of three years as the judgment remains unsatisfied, unless the creditor consents to its restoration.

It would have been more regular to proceed by petition in the bankruptcy proceeding, as this "action" is strictly a "controversy" in bankruptcy, ancillary to the main proceeding; but, since the difference is only one of form, we will disregard it. We have already held in *Healey* v. *Murnaghan*, 34 Fed. Suppl. —, that we have jurisdiction under Sec. 11 to enjoin the commissioner; and that, after the clerk has remitted the judgment to him, it is necessary to call together a court of three judges under Sec. 380 of Title 28, U. S. Code The question is therefore now inescapably presented whether the section is constitutional.

The bankrupt attacks it upon two grounds; first, that it violates the Fourteenth Amendment; and second, that by impairing the effect of a discharge it conflicts with Sec. 17 of the Bankruptcy Act. The first point presents little difficulty. There could be no possible complaint, if the legislature, instead of requiring all drivers to take out insurance, had required only those to do so, who had been once found guilty of careless driving. The only question that can be raised is whether it contradicts that purpose to add the second condition; i. e. that the license will be suspended for three years unless the licensee pays the judgment. That

was the form of the section before 1936, and that we shall consider first. The effect of this was to make the license security for any damage done through the licensee's carelessness, and that was well calculated to increase his care. Indeed—though long use has accustomed us to its acceptance—perhaps insurance against liability for personal fault without some attendant means of enforcing care (such as exists, for example, in the case of marine insurance) always serves somewhat to dampen caution; at least reasonable people might think so, and for that reason a legislature might forbid any insurance whatever against the first few thousand dollars of liability for negligent driving so that drivers should have a pecuniary incentive to avoid collision. This section before 1936 had in substance such a result, and for that reason it did not conflict with the Fourteenth Amendment. So a "statutory court" held in *Munz* v. *Harnett*, 6 Fed. Suppl. 158, and there have been several other decisions elsewhere, upholding similar statutes. *Watson* v. *State Division of Motor Vehicles*, 212 Cal. 279; *Opinion of the Justices*, 251 Mass. 617; *Garford Trucking, Inc.* v. *Hoffman*, 114 N. J. L. 522; *Sheehan* v. *Division of Motor Vehicles*, 140 Cal. App. 206; *State* v. *Price*, 49 Ariz. 19; *Vulter* v. *State Road Comm.*, 119 W. Va. 312

The argument that the section conflicts with Section 17 of the Bankruptcy Act is more plausible. It seems to us at least very doubtful whether, as was said in *Munz* v. *Harnett*, *supra*, (6 Fed. Suppl. 158) it is here relevant that a discharge does not extinguish the debt, but merely tolls the remedy. Whether the section can be justified or not, certainly power to suspend the driver's license is in effect a means of collecting the debt; it takes away his livelihood until he pays, and its imposition lies in the creditor's hands. The fact that the section adds the sanction that the driver, once found negligent, must in any event give security for the future, does not obliterate this; each condition is independent of the other. Therefore, if Sec. 17 must be read as relieving bankrupts of all sanctions for the collection of dischargeable debts, no matter what other public purpose they may serve, the section is invalid, for the Bankruptcy Act is paramount. We do not think that the section so

much impedes the states in their polity. Inability to pay one's debts is not irrelevant in determining one's fitness for many kinds of activity. In *In Re Hicks*, 133 Fed. 739, for example, a city ordinance had provided that no one should be a municipal fireman who did not pay his debts, and the court held the ordinance invalid because it conflicted with the Bankruptcy Act. The ruling seems to us plainly wrong; the city might have good reasons for excluding from a position so vital to its welfare men who were so irresponsible that they would not live within the salaries given them. The fact that in doing so, the ordinance necessarily acted as a sanction for the collection of the debts was not material; the city was still entitled to make its own standards for admission to its fire department. The same reasoning applies here. Drivers of motorcars are a selected class, and of these those who suffer judgments for faulty driving are presumably less likely to be safe drivers than the average. Out of this number to discipline only those who cannot pay judgments against them, might rationally be a further step in the same direction, for it is not unreasonable to say that among careless drivers, those are apt to be more careless who have no financial interest at stake. It is enough if the standard chosen works well on a whole; legislation is inevitably a more or less rough process, and need aim at no more than average success.

We have hitherto considered the section as it stood in 1936 before the amendment which gave the creditor power to consent to the restoration of the license, and before he alone could set the machinery in motion. The plaintiff argues that after these amendments at any rate, if not before, the section became only a remedy for the collection of debts. As to the amendment of 1936 he says that, even if it helped to insure safe driving to make the driver's license security for any judgment against him, it did not further that policy to give the creditor power to restore it; for it would be absurd to say that out of those drivers who have been found both negligent and financially irresponsible, those alone should be disciplined who could not persuade their creditors to be lenient. Yet it is doubtful whether the amendment made any very substantial change. The origi-

nal statute in fact gave the creditor power at any time to restore the license by a complete satisfaction of the judgment; and the amendment merely added to this by enabling him to withdraw his consent, once given, after six months. In any case, whether that change conflicted with Sec. 17, or could be reconciled with the original scheme, we need not decide for reasons that will appear.

The commissioner defends the amendment of 1939 by saying that it was a fair implementation of the purpose of the original section, because it merely relieved the clerk of an irksome duty. He had been obliged to find out whenever a judgment had remained unpaid for fifteen days, whether it was for damages due to negligent driving. Instead of this the amendment set up an automatic system depending upon the creditor's interest in starting the clerk into action. This distinction is, however, more apparent than real because under the section as it stood before 1939, the creditor had the same incentive and he was as likely as thereafter to advise the clerk of the judgment, after which the clerk was bound to proceed. The only change was that after 1939 the clerk could not proceed sua sponte, and that the amendment did thereafter in theory allow the creditor to hold off the suspension. But again, not only could he have done that before 1939 by a satisfaction of the judgment, but the chance that the clerk would have acted without being prodded by the creditor must have been very remote. This amendment also really made very little change in substance.

However, we need not pass on the constitutionality of either of the amendments, for it is well settled in New York, as elsewhere, that a statute itself constitutional, is not affected by an unconstitutional amendment; the amendment is brutum fulmen and drops out as though never passed. People ex rel. Farrington *v.* Mensching, 187 N. Y. 8, 22, 23; Markland *v.* Scully, 203 N. Y. 158, 166; People *v.* Klinck Packing Company, 214 N. Y. 121, 140; Buffalo Gravel Corp. *v.* Moore, 201 App. Div. 242, 248, affirmed on other grounds, 234 N. Y. 542. This doctrine is really no more than an instance of another doctrine, which happens to be especially favored in New York, that a statute will survive the excission of unconstitutional parts, unless it

is apparent that the legislature would not have enacted it with the invalid parts out of it. New York Central & H. R. R. R. *v.* Williams, 199 N. Y. 108, 116; People *v.* Beakes Dairy Co., 222 N. Y. 416, 431, 432; People ex rel. Alpha P. C. Co. *v.* Knapp, 230 N. Y. 48, 60; People *v.* Mancuso, 255 N. Y. 463, 474; Bronx G. & E. Co. *v.* Maltbie, 268 N. Y. 278, 292; Gaynor *v.* Marohn, 268 N. Y. 417, 430. In the case at bar the clerk did remit a certified copy of the judgment to the commissioner; and it makes no difference whether he did so upon the creditor's demand, or sua sponte. The creditor has made no attempt to restore the license, and may never do so; if he does, the commissioner will have to decide whether or not to comply with his demand. As things stand, we need decide therefore only upon the act as it was in 1936, and we agree with Munz *v.* Hartnett, supra (6 Fed. Supp. 158) that it was valid. The temporary injunction will be vacated and the complaint will be dismissed.

Reitz v. Mealey.

I concur.

Alfred Coxe, D. J.

Endorsed: Bk. 28886. United States District Court, Northern District of New York. George C. Reitz, Plaintiff, v. Carroll E. Mealey, Commissioner, Defendant.

Opinion. L. Hand, C. J. Filed Aug. 10, 1940. G. A. Porter, Clerk.

EXHIBIT "B".

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK

GEORGE C. REITZ, *Plaintiff*

vs.

CARROLL E. MEALEY, as Commissioner of Motor Vehicles of the State of New York, *Defendant*.

COOPER, *J.*, Dissenting:

The writer cannot concur with the majority opinion for the reasons appearing herein.

Section 94(b) as it was in 1933 was held a valid exercise of the State's police power in the case of Munz *v.* Hartnett, 6 Fed. Supp. 158, Decided December 20, 1933.

As the Section then read it was the duty of the Commissioner of Motor Vehicles, upon receiving a certified copy of an unsatisfied judgment, to forthwith suspend the operator's or chauffeur's license and all the registration certificates of any person "in the event of his failure within 15 days thereafter to satisfy every judgment—for damages on account of personal injury, including death, or damages to property in excess of $100.00, resulting from the operation of a motor vehicle by him or his agent, or any other person for whose negligence he shall be liable and responsible."

The section further provided that such license and registration certificate:

"shall remain so suspended and shall not be renewed nor shall any other motor vehicle be thereafter registered in his name while any such judgment or judgments remain unstayed, unsatisfied and subsisting, until said judgment or judgments are satisfied or discharged, except by a discharge in bankruptcy, to the extent of or at least five thousand dollars for an injury to one person in one accident and to the extent of ten thousand dollars for an injury to more than one person in one accident, and to the extent of one thousand dollars for an injury to property in any one accident, and until the said person gives proof of his ability to respond in damages as required in Section 95-c of this chapter for future accidents."

The section also provided as follows:

"It shall be the duty of the clerk of the Court, or of the Court, where it has no clerk, in which such judgment is rendered, to forward immediately after the expiration of said fifteen days as aforesaid, to such Commissioner, a certified copy of such judgment or a transcript thereof."

It will thus be seen that the provisions were mandatory for the permanent suspension of the operator's or chauffeur's license and registrations until judgments are paid to

the extent prescribed in the statute and the liability insurance furnished as provided in Section 94 (c).

Suspension of license automatically followed failure within fifteen days to pay the judgment to the extent prescribed to give liability insurance against future accidents.

The negligent and defaulting driver or owner could never again have operator's or chauffeur's license or registration certificate until he paid the judgment to the extent specified and gave the liability insurance required (by section 94-c) as proof of his ability to respond in damages for future accidents.

By 1936 the period of suspension because of non-payment of the judgment specified was reduced to three years, but the same proof of ability to respond in damages for future accidents by furnishing liability insurance was required.

In 1936 the statute was further amended to read as follows:

"Provided, however, if the judgment creditor consents in writing that the judgment debtor be allowed license and registration, the same may be allowed for six months from the date of such consent by the Commissioner and thereafter until such consent is revoked in writing, if proof of ability to respond in damages is furnished in accordance with the provisions of this chapter."

In 1939, Section 94-b was re-enacted, including the above amendment of 1936 and by inserting in the section the words italicized in the quotation from the section.

"It shall be the duty of the clerk to forward immediately—*upon written demand of the judgment creditor or his attorney* a certified copy of such judgment or a transcript thereof."

This insertion is a direction to the Clerk to forward a copy of the judgment to the Commissioner of Motor Vehicles *upon written demand* and not otherwise. This means that without such demand the clerk has no duty.

It is thus clear that since the 1939 re-enactment of Section 94-b, nothing happens to the judgment debtor unless the judgment creditor wills it so. Except for such action by the

judgment creditor, the debtor may apparently drive for the rest of his life without paying the judgment and without obtaining any liability insurance.

On the other hand, action by the judgment creditor will prevent the judgment debtor driving for a single day unless the latter comes to terms with the creditor.

The creditor has but to make written demand on the clerk and the latter must forward "immediately" to the commissioner and the commissioner must thereupon suspend the debtor's license.

The provision inserted in the statute in 1936 and now a part thereof, that if the judgment creditor consents in writing license "may be allowed" by the Commissioner for six months and thereafter until such consent is revoked in writing, is mandatory in legal effect in the absence of any provision that license may be allowed "within the discretion of the commissioner" or "with the approval of the commissioner."

"May" must be construed as "shall" when the contest or subject matter requires such construction.

Supervisors *v.* U. S., 4 Wall. 435.

In U. S. *v.* Thoman, 156 U. S. 353, 359, it is said:

"It is a familiar doctrine that when a statute confers a power to be exercised for the benefit of the public or of a private person, the word "may" is often treated as imposing a duty rather than conferring a discretion.

Mason *v.* Pearson, 9 How. 248.

Washington *v.* Pratt, 8 Wheat. 681.

Supervisors *v.* U. S., 4 Wall. 435."

In People Ex Rel Doscher *v.* Sisson, 222 N. Y. 387, 395, it was held:

"The authorization created by the word "may" was mandatory and not permissive. It is a general though not inflexible rule that permissive words used in the statutes conferring powers and authority upon officers or bodies will be held mandatory when the act authorized to be done concerns the public interest or the rights of individuals" (citing cases).

It will be seen that this section makes the Commissioner of motor vehicles a disguised collection agent for the judgment creditor. All public policy of protection for the public is eliminated. No longer must the non-paying judgment debtor inescapably lose permanently, or for three years, his right to operate a motor vehicle, unless he pays the judgment to the extent defined in the section.

He now has the privilege to operate the motor vehicle without compliance with the statute as it was, but that privilege is within the sole control of the judgment creditor. He must bargain with the creditor for installment payments or other consideration satisfactory to the creditor.

If terms are not made, the judgment creditor makes written demand on the clerk of the Court and the latter is required to forward immediately to the Commissioner a certified copy of the judgment. The Commissioner must thereupon suspend the judgment debtor's license. Immediately upon the later coming to terms with the judgment creditor, the judgment creditor by written consent requires the commissioner to revoke the suspension for six months. At the end of six months, if terms are not complied with, suspension again ensues. If terms are complied with no suspension takes place at all. This consent to operate may cover the whole three years period.

No public officer has any power to deny the judgment creditor's will, whoever that creditor may be. The statute makes it the duty of the Clerk of the Court and the Commissioner to carry out the judgment creditors will in suspending or not suspending the license. That the Clerk and the Commissioner will be compelled by mandamus to act as the judgment creditor demands is without doubt.

Jones *v.* Harnett, 247 A. Div. 7, Affirmed 271 N. Y. 626.

It is quite true that the judgment debtor need not accept the demand which the judgment creditor may make as a condition of raising the three year ban, but accept he must or lose the right or privilege of operating an automobile on the public highway. If his occupation is that of driving an automobile or truck, as here, this means that his livelihood is in the sole control of the judgment creditor.

Under this statute all pretense of the exercise of the police power of the State for the protection of the public

using the highways by suspending the license for three years must be deemed to be abandoned.

The ultimate power of suspension is exclusively vested in the discretion of a private citizen.

Moreover, the private citizen may at some time be not a citizen at all but the worst felon out of prison, for his right to sue is not lost except in case of life imprisonment (Section 511 N. Y. Penal Law).

Statutes are to be construed by what is possible under them.

People *vs.* Klinck Packing Company, 214 N. Y. 121, 139.

This statute is unique in delegating its enforcement to unknown private citizens in their discretion and for their own interest, and no case passing a like statute has been found. But authorities have been found analogous in principle.

An act attempting to delegate legislative power even to a public officer to be exercised in his discretion is invalid.

People *vs.* Klinck Packing Company, 214 N. Y. 121, 138 Supra.

How much more invalid is the attempt to delegate such power to unknown and unknowable private citizens to be exercised in their discretion.

It is held in substance that the state police power can neither be abdicated nor bargained away and is inalienable even by express grant.

Atlantic Coast Line Ry. *vs.* Goldsboro, 232 U. S., 548, 558.

The State may not surrender or bind itself not to exert its police power.

Phillips Petroleum Company *vs.* Jenkins, 297 U. S. 629, 635, also

Chicago and A. R. R. Company *vs.* Traubarger, 238 U. S. 67, 77.

In Coppage *vs.* Kansas, 236 U. S. 1, it was held in substance that a statutory provision which is not a legitimate police regulation cannot be made such by being placed in the same act with a police regulation or by being enacted under a title that declares a purpose which would be a proper object for the exercise of that power.

In Henning *vs.* Georgia, 163 U. S. 299, 304, it was held that where a state statute purporting to be enacted under the

police power of the state has no real or substantial relation to the object sought, or is a palpable invasion of the rights secured by fundamental law, it is invalid.

In Gulf C. S. St. R. Railways *vs.* Ellis, 165 U. S. 150, it was decided that a statute which is merely to compel the payment of an indebtedness does not come within the scope of the police power.

It seems reasonably clear, therefore, that Section 94-b is not a valid exercise of the police power of the State.

By itself, the question of whether or not Section 94-b is a valid exercise of State Police Power might not present a Federal question and could not, therefore, be decided here if it were the sole question for decision. But where a federal question is presented, the Court has jurisdiction to decide the state questions.

In Greene *vs.* Louisville & I. Railway Company, 244 U. S. 899, the headnote says:

"In cases in which the jurisdiction of the District Court is properly invoked upon a substantial controversy arising under the Constitution of the United States, the jurisdiction of that Court and of this Court on Appeal, extends to the determination of all questions involved, including questions of State Law, irrespective of the disposition that may be found of the Federal question and of whether it be found necessary to decide it at all."

See also Chi G. W. R. *vs.* Kendall, 266 U. S. 94.

L. & N. Railway *vs.* Garrett, 231 U. S. 298.

The Federal question here is whether or not section 94-b violates any provision of the Federal Constitution or of laws enacted under power delegated exclusively to the Federal Government.

The decision here might rest upon the invalidity of Section 94-b as an exercise of State police power.

But the section also invades the field of bankruptcy delegated by the U. S. Constitution to the Federal sovereignty.

It is a transparent attempt by the State to provide a means by which the private citizen may, in violation of the bankruptcy laws of the United States, collect his judgment in whole or in part from one and an unknown class of persons, viz, those licensed to operate a motor vehicle on those high-

ways against whom a negligence judgment arising from the operation of such motor vehicle has been recovered and remains unpaid, which judgment is discharged under the bankruptcy laws or will be discharged.

The Statute expressly says that the license when suspended at the judgment creditors discretion:

"shall remain so suspended * * * while any such judgment or judgments remain unstayed, unsatisfied and subsisting either until said judgment or judgments are satisfied or discharged *except by discharge in bankruptcy* to the extent * * *" etc.

In other words, it is an attempt on the part of the one state to withdraw from the Federal Government, for the benefit of a limited class of persons, a portion of the bankruptcy power delegated by the States to the Federal Government in the Constitution and thereby destroy the uniformity of the bankruptcy laws, so far as the State of New York is concerned. One of the functions of that Federal Power under the Constitution is to declare what judgments are dischargeable and to provide for their discharge.

When the bankrupt is discharged from his debts under the Federal Bankruptcy Law, no state has power to make any sanctions or procedure by which a discharged judgment may nevertheless be collected under whatever guise that sanction or procedure may be dressed.

When a state by statute, not a valid exercise of police power, attempts to do so, its statute invades the Federal field of bankruptcy, and is in conflict with the Federal Constitutional power.

In Gilbett's Collier on Bankruptcy, (4th Ed.) at Page 2 it is said:—

"The bankruptcy act having been adopted by Congress under the Constitutional delegation of power is the supreme law of the land and its provisions are paramount to any state statute."

Numerous authorities might be cited:—The following suffices.

Local Loan Company *vs.* Hunt, 292 U. S. 234, 244, 245.

That the discharge of bankrupts from dischargeable debts is a matter of public interest was declared in Hanover National Bank *vs.* Moyees, 186 U. S. 181, where the Court said at Page 192—

"The determination of the status of the honest and unfortunate debtor by his liberation from encumbrance on future exertion is a matter of public concern and Congress has power to accomplish it throughout the U. S. by proceedings at the debtor's domicil."

To the same effect are:—

Williams *vs.* U. S. Fidelity & Guaranty Company, 236 U. S. 549, 555-555.

Local Loan Company *vs.* Hunt, 292 U. S. 234, 244 Supra.

Courts are not to be influenced by the hardship which some innocent person may suffer because judgments recovered against negligent operators of automobiles are dischargeable in bankruptcy and there, therefore uncollectible.

The remedy lies with Congress which can make such judgments non-dischargeable, not with the Courts or the State Legislature.

It is said in the majority opinion that the provisions placed in Section 94-b in 1936 empowering the judgment creditor to require the Commissioner to give permission for the debtor to operate his automobile for six months and thereafter until the creditor withdraws the permission, and the 1939 insertion which together with the 1936 provision gives the creditors sole power to start or not start the suspension proceedings, may be entirely stricken out of the statute by decision of this Court and still leave the remainder of the section valid and constitutional.

The majority opinion does not say that these 1936 and 1939 provisions are unconstitutional but holds such decision not necessary because they may be stricken out and leave a valid and constitutional remainder of the section.

The writer cannot concur in this view.

It is, of course, well recognized, that if some part or parts of a statutory scheme or regulation is or are unconstitu-

tional and readily separable and the general scheme and regulation as intended by the Legislature remains unimpaired, such part or parts may be stricken out and the remainder of the statute held valid.

Such is the effect of the authorities cited in the majority opinion.

Reference to one will illustrate this.

People Ex Rel Alpha P. Company *vs.* Knapp, 230 N. Y. 48 was concerned with a revenue act.

The Court there found a condemned part easily separable and said at Page 62:—

"Thus viewing it, I cannot doubt that the exclusion of interest on intangibles will leave the *essence of the scheme intact.*"

The other cases are generally of like nature.

The teaching of these cases is that only where the general scheme and intent of the statute is not impaired, separable parts not constitutional may be stricken out and the remaining held valid.

These cases are not controlling here because here we do not have any such statute as those there involved and because here, after the elimination of the condemned parts, the essence of the statutory scheme does not remain intact.

In statutory construction it is the duty of the Courts to find and give effect to the legislative intent.

Matter of Hering, 196 N. Y. 218, 221.

Osborne *vs.* Int. Ry. 226 N. Y. 421, 425.

People Ex. Rel. Babcock *vs.* Law, 209 App. Div. 526.

Courts will assume that legislatures in passing an amendment to a statute intended to effect such material change as is indicated by the amendment, otherwise the legislation would be nugatory.

People Ex. Rel Sheldon *vs.* Board of Appeals, 234 N. Y. N. Y. 484.

This section 94-b is not a complicated taxing act as in some of the cases referred to in the majority opinion, nor a complex regulatory act as in Buffalo Gravel Company *vs.* Moore, 201 App. Div. 242. This act is an integral and indivisible unity. It is but one thing. It has but one object, viz, a

statutory scheme by which the negligence judgment creditor may collect his judgment, which scheme places all power of starting, stopping, and restarting the statutory machine under exclusive control of the creditor and provides that the Court Clerk and Commissioner can act only as he commands, all of which is but a statutory scheme by which the negligence creditor may collect a debt dischargeable in bankruptcy.

That the legislature meant it so also admits of no doubt for in 1936 and 1939 it made the changes (including re-enactment in 1939) deliberately and intentionally changing to such an act as above outlined, from an act providing for mandatory automatic suspension of a defaulting judgment debtors license forever (later changed to three years) over which suspension the judgment creditor had not one iota of power or control.

When the part of the statute found unconstitutional is so connected with the general scope and purpose of the legislation that its imperfections destroy the latter, it cannot be eliminated and the statute as a whole must fall.

People *vs.* Klinck Packing Company, 214 N. Y. 121, 140 Supra.

Where the invalid is so commingled with the valid, is so large and essential a part of the general scheme that Revision is impossible, the statute as a whole is invalid.

Meyer *vs.* Wells Fargo Express Company, 223 U. S. 298, cited with approval in

People Ex. Rel Alpha P. Company *vs.* Knapp, 230 N. Y. 48, 60 Supra.

Ives *vs.* South Buffalo Railway Company, 201 N. Y. 271, 317.

An interesting discussion of the difficulties of attempting to separate condemned parts in a statute devoted to a limited object is contained in the dissenting opinion of Judges Kellogg & O'Brien in People *vs.* Mancuso, 255 N. Y. 463, 487, where the dissenting Judges held:—

"Nevertheless, the two parts, valid and invalid, must be 'capable of separation,' (Supervisors *vs.* Stanley, Supra, Page 312), the valid part will be retained only "provided the allowed and prohibited parts are severable." (Packet

Company *vs.* Keokuk, 95 U. S. 80, 89); it will be retained only if the unconstitutional part is clearly "separable". (Berea College *vs.* Kentucky supra; Huntington *vs.* Worthen supra.) In all the cases cited, and in many more, where a constitutional provision has been "separated" and saved, although contained in the same clause with an unconstitutional provision, the statutes considered have been of wide application, comprehending as the subjects of a tax, a prohibition, or a regulation, non-taxable properties or matter incapable of prohibition, or regulation by the enacting statute as well as properties or matters properly the subject of its enacting powers. The provisions allowed to remain have by their terms covered permissible subjects; subjects forbidden by reason of the constitution,--have merely been released from the statutory coverage."

If the condemned parts are stricken out of Section 94-b, it does not leave the "essence of the scheme intact", as in People ex rel Alpha P. Company *vs.* Knapp, 230 N. Y. 48 Supra. On the contrary it completely destroys the intended statutory scheme.

What is left of the Section is not the statutory scheme now embodied in the statute, but it is the scheme of the statute as it was before 1936. This scheme the majority of the Court approve and hold may be saved and made effective as a laudable statute.

But if this is done, gone are all such rules of construction as that it is the duty of the Courts to find and give effect to the legislative intent, which is here so manifest; that when the legislature amends a statute it intends to make such material change as is indicated by the statute; that a statute will not survive the excission of unconstitutional parts if it is apparent that the legislature would not have enacted it with the invalid parts out of it; that courts can only separate and strike out parts of a statute as unconstitutional and hold the remainder of the statute valid if that remainder embodies and preserves the essence of the general scheme and purpose of the statute.

How then can it reasonably be said here that the condemned parts are separable and that what remains embodies the "essence of the scheme intact?"

In short, the statute is one thing as it stands. To strike out the condemned parts is to change the statute to something quite different.

For the Court to strike out the condemned parts and thereby change the statute into something not intended or contemplated by the legislature in 1936 and 1939 borders on judicial legislation. It is an invasion by the judicial power of the governmental field reserved for the legislature power.

It is in effect saying to the State Legislature that it cannot have the statute that it deliberately created by amendment in 1936 and by re-enactment in 1939 with further change, but it can have and must have a statute which the Court approves as a salutary statute but which the legislature deliberately discarded and abandoned in 1936 and 1939.

It matters not that when the legislature next meets it has power to repeal the court-approved statute and enact such statute as it pleases. It is no less an invasion during the interim.

This is not a state Court passing in a state statute challenged as violating the state constitution.

This is a Federal court invoked to determine whether or not a state statute violates the Federal constitution.

The writer cannot concur in the majority opinion and holds that the statute is a unity and inseparable, is unconstitutional and void and its enforcement should be restrained.

August 13, 1940.

Endorsed: Bk. 28886. United States District Court, Northern District of New York. George C. Reitz vs. Carroll E. Mealey, Commissioner of Motor Vehicles of the State of New York.

Opinion: Frank Cooper, U. S. District Judge.

Orig. filed Aug. 14, 1940. G. A. Porter, Clerk.